

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Docket No.: 1:18-cv-11336FDS

COMMONWEALTH OF MASSACHUSETTS
ex rel. MYKEL POWELL, COMMONWEALTH
SECOND AMENDMENT, INC. and BRENT
CARLTON; and MYKEL POWELL,

Plaintiffs,

v.

BRIAN HOLMES, in his Individual and his
Official Capacity as Deputy Chief of the
Stoughton Police Department; JAMES
O'CONNOR, in his Individual and his Official
Capacity as Sergeant of the Stoughton Police
Department; DONNA M. McNAMARA, in her
Individual and his Official Capacity as Chief of
the Stoughton Police Department; VILLAGE
GUN SHOP, INC. d/b/a VILLAGE VAULT;
PETER DOWD; CITY OF SPRINGFIELD;
TOWN OF PLYMOUTH; TOWN OF
WINCHESTER; CITY OF CHICOPEE; TOWN
OF DEDHAM; CITY OF MEDFORD; TOWN
OF READING; TOWN OF WAKEFIELD;
TOWN OF WILMINGTON; TOWN OF
ANDOVER; TOWN OF FOXBOROUGH; CITY
OF GARDNER; TOWN OF HUDSON; and
TOWN OF SAUGUS,

Defendants

**STOUGHTON DEFENDANTS' MOTION TO DISMISS COUNTS I AND III
OF THE PLAINTIFFS' THIRD AMENDED COMPLAINT**

Pursuant to Fed. R. Civ. P. 12(b)(6), Deputy Chief Brian Holmes, Sergeant James
O'Connor and Chief Donna McNamara of the Stoughton Police Department move this
Honorable Court to dismiss Count I (Fourteenth Amendment procedural due process

under 42 U.S.C. § 1983) and Count III (Civil Conspiracy) of the Plaintiffs' Third Amended Complaint. The Plaintiffs attempt claims against the Stoughton Defendants in both their individual and official capacities.

The procedural due process claim (Count I) fails against Holmes, O'Connor and McNamara ("Stoughton Defendants") in their individual capacities because they are protected by qualified immunity. The official capacity claims fail because the Plaintiffs do not allege that any constitutional rights were violated due to a policy of the Town of Stoughton.

The civil conspiracy claim (Count III) fails to state a claim because the factual allegations in the Third Amended Complaint do not establish the existence of an underlying tort by either O'Connor or McNamara.

WHEREFORE, the Stoughton Defendants respectfully request that this Honorable Court dismiss Count I and Count III of the Plaintiffs' Third Amended Complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,
The Defendants,
Brian Holmes, James O'Connor and Donna McNamara,
By their attorneys,

/s/ Thomas R. Donohue

Thomas R. Donohue, BBO# 643483
Deidre Brennan Regan, BBO# 552432
BRODY, HARDOON, PERKINS & KESTEN, LLP
699 Boylston Street, 12th Floor
Boston, MA 02116
(617) 880-7100
tdonohue@bhpklaw.com
dregan@bhpklaw.com

DATED: September 21, 2020

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(2)

I hereby certify that I have conferred with counsel for the Plaintiffs in a good faith attempt to discuss this matter and we were not able to resolve or narrow the issues raised in this motion.

/s/ Thomas R. Donohue

Thomas R. Donohue, BBO# 643483

DATED: September 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the ECF system and will therefore be sent electronically to the registered participants as identified on the Notice of Electric Filing (NEF) and paper copies will be sent this day to those participants indicated as non-registered participants.

/s/ Thomas R. Donohue

Thomas R. Donohue, BBO# 643483

DATED: September 21, 2020